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GREGORY L. REYES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY L. REYES,

Defendant.

Case No. CR06-00556 CRB

DEFENDANT GREGORY L. REYES'S PRINCIPAL SENTENCING MEMORANDUM

Date: June 24, 2010
Time: 10:00 a.m.
Dept.: Courtroom 8, 19th Floor
Judge: Hon. Charles R. Breyer

Trial Date: February 22, 2010

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I. INTRODUCTION

Following retrial, Mr. Reyes again stands before this Court to be sentenced for offenses first charged nearly four years ago, in August 2006. Over these years, through the indictment, first trial, appeal and reversal, SEC action, multiple civil actions, and now a second trial, Mr. Reyes has been subjected to significant personal, professional, and financial burdens even before undertaking the sentence this Court will impose on June 24th. The memoranda and letters submitted in the first sentencing fully and accurately portrayed Mr. Reyes as devoted to his family, tireless in his work for Brocade and its employees, steadfast in friendship, and exceedingly generous of his time and resources. While the fundamental character that Mr. Reyes has demonstrated throughout his life remains unchanged today, the interval since the first sentencing in January 2008 has presented challenges to Mr. Reyes and his family that merit the Court's reconsideration of the sentence previously imposed.

For the reasons set forth below, Mr. Reyes respectfully submits that a downward variance from the Guidelines range—particularly if the Court imposes the same enhancements as it did in the first sentencing—is justified and will more than adequately serve the purposes of sentencing pursuant to 18 U.S.C. § 3553(a). As explained below, Mr. Reyes's principal sentencing position is that the enhancements imposed in the first sentencing (with the exception of the public-officer enhancement) should not be imposed here, leading to an Adjusted Offense Level within Zone C; under this calculation, Mr. Reyes would be eligible for a non-custodial sentence, and requests that the Court consider imposing such a sentence. However, in the event the Court's Guidelines calculations do not change, Mr. Reyes requests that the Court impose a sentence comprising (1) a term of imprisonment well below the Guideline range of 18–24 months, followed by (2) the minimum term of supervised release, (3) no order of restitution, and (4) a substantial reduction in the $15 million fine imposed in the first sentencing.[1]

[1] Mr. Reyes further requests that the Court again permit him to remain released on the same terms as were imposed upon pretrial release, as the Court allowed following the first sentencing, (Reporter's Transcript ("RT") of Sentencing Proceedings (Jan. 16, 2008), at 49:21–23), and as the United States Probation Office has recommended in its current Presentence Investigation Report. (*See* Presentence Investigation Report (Jun. 10, 2010), "Sentencing Recommendation" at 3 ("Voluntary Surrender").) Mr. Reyes opposes the government's request that he be detained at the conclusion of the June 24, 2010 sentencing

II. BACKGROUND

A. Personal Characteristics

Mr. Reyes incorporates by reference, and requests that the Court review, the background and personal characteristics discussions in his principal brief in the first sentencing. (*See* Def.'s Position re Sentencing & Response to Presentence Report (Dkt. No. 797) at 8:2–9:21; 12:23–19:3.)

B. Court's Offense Level Calculations in 2008

When Mr. Reyes was sentenced in January 2008, the Court applied a base offense level of seven. (RT, Sentencing (Jan. 16, 2008) at 4:1–9.) The Court applied a four level enhancement because Mr. Reyes was an officer of a publicly traded company and the offense involved a violation of securities laws (*id.* at 4:19–22; Order Re Sentencing Guidelines ("Order," Dkt. No. 737) at 11:20–24 & 14:4–5),[2] and a four-level enhancement after finding that Mr. Reyes was an organizer or leader of an extensive criminal activity (RT, Sentencing, at 4:24–5:4; Order at 11:26–12:28 & 14:5–6). Further, the Court applied a two level enhancement for obstruction of justice relating to Mr. Reyes's declaration filed in support of Stephanie Jensen's motion for severance. (RT, Sentencing, at 5–9.)

The Court declined to impose an enhancement for "sophisticated means," finding that the "scheme was not significantly more complex than a case involving routine securities fraud." (*Id.* at 9:25–10:5; Order at 13:1–15.) The Court further declined to apply a six level enhancement for Mr. Reyes's conduct harming more than 250 victims because the government did not establish that his conduct caused any actual loss. (Order at 11:5–18.)

With an adjusted offense level of 17, the Court found the applicable Sentencing Guidelines range was 24 to 30 months. (RT, Sentencing, at 17:20–21.) After considering the factors under 18 U.S.C. § 3553 and the parties' arguments, the Court imposed a sentence of 21

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hearing (*see* Dkt. No. 1192), and will file separately his opposition to the government's motion.

[2] Mr. Reyes concedes that the public officer enhancement, currently at U.S.S.G. § 2B1.1(b)(17)(A), is applicable here. However, as discussed below, respectfully urges the Court not to impose a duplicative enhancement under section 3B1.1 for an aggravating role in the offense.

months, which was "lower than that of the low end of the sentencing guidelines." (*Id.* at 46:14–15.) The Court explained the driving factors for imposing a below guidelines sentence as follows (*see id.* at 47:18–19):

> Mr. Reyes is a good and decent individual, if anything has come loud and clear in the over 400 letters that I have received it is that he has led a life dedicated to trying to help others. He has done so unselfishly. He has done so anonymously. He has done so with the highest purpose of helping others. And I think that it's only fair to give some recognition for his extraordinary acts of charity.
>
> . . .
>
> He is generous. He is generous in a way that sets, I think, the very—he's the essence of what you want to see in an individual from whom much has been given; he gives much. And he does so in an anonymous way.
>
> . . .
>
> [T]here [should] be some recognition, some recognition . . . of the fact that he, I believe, has been changed by this experience, as he himself has said.
>
> . . .
>
> And I think, also, that before this incident occurred he acted in a way, with respect to others, to try to help the less-advantaged people. That is one of the nobler purposes of charity. And it ought to be recognized, to some extent, by the sentencing court.

(*Id.* at 46:16–23, 47:3–6 & 47:8–17.)

Mr. Reyes's conduct since the last sentencing only reinforces the Court's observations. Based on the verdict in the retrial, which included an acquittal on the Count 1 conspiracy charge, as well as the sentencing materials submitted in 2007–2008, Mr. Reyes respectfully submits that a substantial reduction in the sentence imposed in 2008 is warranted.

III. APPLICABLE SENTENCING GUIDELINES AND LEGAL STANDARDS

A. Guidelines Manual

Mr. Reyes recognizes that under the Sentencing Guidelines' grouping rules (sections 3D1.1–3D1.3), the 2009 Sentencing Guidelines govern the base offense level in this case. (Order at 3:15–19; RT (Jan. 16, 2008) at 4:1–9.) However, Mr. Reyes reinstates his objection[3]

[3] Mr. Reyes objected to the Proposed Presentence Investigation Report (disclosed on May 20, 2010) that the current Guideline Manual (Nov. 2009) should be used "as there are no *ex post facto* issues." His

that the same *ex post facto* issues that existed during his first sentencing—by virtue of using any Guidelines effective after the January 25, 2003 revisions—still remain today.[4] For present purposes, the 2009 Sentencing Guidelines govern the base offense level in this case.

B. Evidentiary Standards in Finding Facts Supporting Enhancements

A district court typically applies the preponderance-of-the-evidence standard when finding facts pertinent to sentencing, but when a sentencing factor has an "'*extremely disproportionate* effect on the sentence relative to the offense of conviction,' due process may require a district court to apply a heightened standard." *United States v. Berger*, 587 F.3d 1038, 1047 (9th Cir. 2009) (internal citations omitted). As this Court previously held, the clear and convincing standard is appropriate in this case under the "totality of the circumstances" test set forth in *United States v. Jordan*, 256 F.3d 922, 928 (9th Cir. 2001). (Order at 2:11–24.)[5]

As discussed in Mr. Reyes's opposition to the government's request for a loss-enhancement, the clear-and-convincing standard would apply to any finding of loss by virtue of the extremely disproportionate effect of such an enhancement would have on the Adjusted Offense Level. (*See* Def.'s Response to the Government's Memorandum of Law in Support of Its Position on Loss and Restitution ("Loss Response") (Dkt. No. 1183) at 11:6–12:14 & nn. 5–9.) In addition, Mr. Reyes submits that it would comport with due process to apply the clear-

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objection is referenced in the final Presentence Investigation Report (disclosed on June 10, 2010) in the Addendum at ¶ 3 (Def.'s Obj. No. 1).

[4] The Court previously stated the November 1, 2001 Sentencing Guidelines should apply to Count Five, the November 1, 2002 Sentencing Guidelines to Counts Six, Nine, and Ten, and the Sentencing Guidelines effective November 1, 2007 to all remaining counts. (Order at 3:3–4 & 3:12–14.) However, the grouping rule in the Guidelines mooted the need to apply different Guideline Manuals. (*See* RT (Jan. 16, 2008) at 15:16–21 (defendant's position regarding *ex post facto* considerations for some counts was well-taken, although moot due to grouping of the counts); Sentencing Minutes (Dkt. No. 815).)

[5] Under this analysis, the court should consider: (1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment; (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (4) whether the increased sentence is based on the extent of a conspiracy; (5) whether an increase in the number of offense levels is less than or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence. *Jordan*, 256 F.3d at 928; *see United States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010) (citing *Jordan*'s totality of the circumstances test).

and-convincing standard if the Court applies enhancements beyond the public-officer enhancement (discussed below) that would result in an Adjusted Offense Level increase from 11 to 17 or more. *See, e.g.*, *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) (seven-level increase in offense level, more than doubling the applicable sentencing range, satisfied extremely disproportionate impact test).

C. Applicable Legal Standards for Sentencing After Reversal and Remand

Except in circumstances not applicable here, Ninth Circuit case law does not allow for an increased sentence following a retrial after appellate reversal of the original judgment. Specifically, when resentencing a defendant on remand after a reversal and retrial, a more severe sentence than was previously imposed may be presumed to be "vindictive" unless the record reflects "objective information . . . justifying the increased sentence." *United States v. Rapal*, 146 F.3d 661, 663 (9th Cir. 1998) (internal quotations and citations omitted). Where the government fails to provide such additional, objective information—as it failed to do in this retrial—an increased sentence is impermissible. *See United States v. Garcia-Guizar*, 234 F.3d 483, 490 (9th Cir. 2000) (where reasons justifying increased sentence do not affirmatively appear in record, "a presumption arises that a greater sentence has been imposed for a vindictive purpose" (internal citations and quotations omitted)).

IV. SUMMARY OF MR. REYES'S SENTENCING POSITION AND RESPONSES TO FINAL PRESENTENCE INVESTIGATION REPORT

Mr. Reyes agrees with the recommendation in the Presentence Investigation Report disclosed by the United States Probation Office on June 10, 2010 ("PSR"), that the Court consider a downward variance from the applicable Guidelines range for the reasons stated therein and discussed in greater detail below. (*See* PSR at ¶ 86, pg. 20.) Mr. Reyes further agrees with the PSR's recommendation that no restitution be ordered, based on the Court's prior rulings on the issues of loss and number-of-victims enhancements. (*See id.*, Sentencing Recommendation at pg. 2.)

However, Mr. Reyes respectfully disagrees with the PSR's recommendation to impose enhancements for aggravating role (+4) and obstruction of justice (+2) (*see id.* at ¶¶ 34–43,

pgs. 10–11), and submits that the calculated Adjusted Offense Level ("AOL") of 17, within Zone D, and advisory Guidelines range of 24–30-months imprisonment overstates the seriousness of the offense and would not well serve the purposes of sentencing. For the same reasons, Mr. Reyes respectfully disagrees with the recommendation that the Court consider an upward variance from the 24–30-month range. (*Id.* at ¶ 84, pg. 19.) As further discussed below, Mr. Reyes also submits that the PSR's recommendation for a $15 million fine is excessive and unnecessarily punitive in light of changed circumstances since the first sentencing in 2008.

Based on his objections to the PSR's recommended sentencing enhancements for aggravating role (+4) and obstruction of justice (+2), both of which are discussed in detail below, Mr. Reyes submits that the appropriate AOL is 11, with a range of 8–14 months. Because an AOL of 11 is within Zone C, Mr. Reyes respectfully requests that the Court consider the alternatives to imprisonment set forth in the Guidelines.

Alternatively, if the Court does *not* impose the two-level enhancement for obstruction of justice, but *does* impose an aggravating-role enhancement, the resulting AOL would be as follows: for a four-level aggravating-role enhancement, an AOL of 15, which is within Zone D with range of 18–24 months; and for a two-level aggravating-role enhancement, an AOL of 13, which is within Zone D with range of 12–18 months. Under either of these scenarios, Mr. Reyes requests that the Court vary downward from the respective advisory Guidelines ranges.

Finally, if the Court applies the same sentencing enhancements as it did in 2008, leading to an AOL of 17 with a range of 24–30 months, Mr. Reyes respectfully requests that the Court exercise its discretion to vary downward from the Guidelines range. For the reasons discussed below, Mr. Reyes submits that a term of imprisonment substantially below the 21-month term imposed in 2008 is warranted on resentencing.

Regardless of the enhancements applied and resulting AOL, Mr. Reyes requests that the Court (1) impose the minimum possible term of supervised release, (2) again decline to order restitution, and (3) substantially reduce the $15-million fine imposed in 2008.

V. APPLICATION OF SPECIFIC ENHANCEMENTS UNDER THE SENTENCING GUIDELINES

A. A Sentencing Enhancement for Loss Remains Inappropriate in this Case.

Mr. Reyes previously submitted to this Court his Loss Response (Dkt. No. 1183). Pending the Court's ruling on that issue, Mr. Reyes incorporates here by reference his position regarding why a loss enhancement continues to be inappropriate. In particular, Mr. Reyes notes his previously filed objection to the argument, raised for the first time in the government's reply brief, that the Court calculate a $1.9 million loss based on purported "gain" from Mr. Reyes's sale of allegedly backdated options. (*See generally* Def.'s Objection to United States' Reply Mem. in support of Its Position on Loss and Restitution (Dkt. No. 1190).)

B. The Court Should Again Decline to Increase Mr. Reyes's Offense Level Based on the Number of Victims of His Offense Conduct.

The government suggests that the Court should apply an enhancement based on the number of victims under section 2B1.1(b)(2). Specifically, if the offense: (A) involved ten or more victims or was committed through mass-marketing, a court may increase by two levels; (B) involved 50 or more victims, a court may increase by four levels; or (C) involved 250 or more victims, a court may increase by six levels. U.S.S.G. § 2B1.1(b)(2). While the government previously argued that Mr. Reyes's "conduct harmed more than 250 investors because he deprived them of their right to truthful and accurate financial statements," the Court held that the Guidelines "do not permit an enhancement merely because an investor is deprived of his right to truthful information." (Order at 11:6–8 & 11:12–13; RT (Jan. 16, 2008) at 10:9–11 ("there were no victims within the meaning of that term as it is used in the sentencing guidelines for enhancement purposes") & 16:25–17:1 (overruling objection on number of victims).) The Court noted that the term "victim" is narrowly defined in the Guidelines as "any person who sustained any part of the *actual loss* determined under subsection (b)(1)." (Order at 11:12–15, citing U.S.S.G. § 2B1.1, cmt. n.1 (emphasis in original).)

In support of its most recent attempts at proving loss, the government provided no new argument or information addressing what the Court previously deemed to be a significant problem with the government's loss argument in Mr. Reyes's first sentencing. (*See generally*,

Loss Memorandum; Order at 5:23–25.) Namely, the government simply fails to provide a reliable method of identifying whether and which investors suffered *actual loss* based on the decline in stock price on January 7, 2005 (*see* Loss Response at 24–26); absent such a finding, the Guidelines do not provide for a victim enhancement, U.S.S.G. § 2B1.1, cmt. n.1. For these reasons, the Court should again decline to apply a number-of-victims enhancement.

C. The Court Should Again Decline to Apply a Sophisticated-Means Enhancement.

As previously stated in this Court's Order, sophisticated means refer to "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." (Order at 13:3–5, citing U.S.S.G. § 2B1.1, App. Note 8(B).) Under that standard, the Court has already held that "the scheme was *not* significantly more complex than a case involving routine securities fraud" (*id.* at 13:6–7 (emphasis in original)) and that such enhancement should be reserved for outliers (*id.* at 13:11). In so holding, the Court rejected the government's argument that "the high level of accounting knowledge required to carry out the scheme" and "manipulation of corporate records" sufficed as sophisticated means. (*Id.* at 13:8–11 ("[T]hose two characteristics are common in even routine securities fraud cases."); *see* RT (Jan. 16, 2008) at 17:3–6 ("It appears to the Court that the defendant's scheme was not atypical of other securities fraud offenses, and did not entail sophisticated means.").)

The evidence in the 2010 trial gives no reason for the Court to depart from its previous conclusion that this case "involved little more than printing out a price chart of Brocade's stock prices and picking a day with [a] relatively low stock price on which to grant the options and then doing the requisite paperwork." (Order at 13:12–14.) Indeed, such conduct is distinguishable from "[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts" which "ordinarily indicates sophisticated means." U.S.S.G. § 2B1.1, App. Note 8(B); *see United States v. Montano*, 250 F.3d 709, 715 (9th Cir. 2001) (reversing enhancement because defendant's activities were "crude and very basic" and there was no evidence that his conduct involved efforts at concealment beyond concealment inherent in the offense). Because there was no additional evidence at this

trial that Mr. Reyes engaged in any intricate or complex conduct, that the nature of the offense conduct involved any different conduct than presented at the first trial, nor that Mr. Reyes utilized any especially complex methods to conceal his conduct, the Court should again reject this enhancement.

D. The Court Should Not Apply a Four Level Enhancement for Mr. Reyes's Role in the Offense.

In the first sentencing, the Court applied a four-level enhancement under Guidelines Manual section 3B1.1(a) because Mr. Reyes was a leader of a criminal activity and the criminal activity was otherwise extensive. (Order at 11:26–12:2; RT (Jan. 16, 2008) at 4:24–5:4 (finding role in the offense enhancement appropriate for reasons set forth in Order).) This section provides that based on the defendant's role in the offense, a court may apply:

> (a) a four-level increase if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive;
>
> (b) a three-level increase if the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive; or
>
> (c) a two-level increase if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b).

U.S.S.G. § 3B1.1.

Mr. Reyes submits that no increase should be imposed for his role in the offense, but that *if any* enhancement is applied, it should be for only two levels under sub-section (c). In light of Mr. Reyes's acquittal on the conspiracy charge, the Ninth Circuit opinion in *Reyes,* and the findings in Stephanie Jensen's sentencing, the Court should reconsider whether Mr. Reyes was a leader of a criminal activity, that he "oversaw the participation of" Stephanie Jensen, and that the criminal activity was extensive. (*See* Order at 11:25–12:28.)

1. Mr. Reyes's acquittal on the conspiracy charge undermines a finding that he was a leader or organizer of a criminal activity involving five or more participants.

The jury's conclusion that there was no "criminal partnership" between Mr. Reyes and Ms. Jensen weakens the suggestion that there were five or more participants under section 3B1.1. Under this section, "[a] 'participant' is a person who is *criminally responsible* for the

commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, App. Note 1 (emphasis added); *United States v. Luca*, 183 F.3d 1018, 1024 (9th Cir. 1999) ("Unknown facilitators of crimes will not be considered criminally responsible participants."). As this Court has recognized, this enhancement requires finding not only the existence of five or more participants, but that the defendant "exercised control over at least one other participant, regardless of whether the offense was 'otherwise extensive.'" (*United States v. Jensen*, Order Re Sentencing Guidelines ("Jensen Order") (Dkt. No. 851) at 12:16–17.) Mr. Reyes submits that the tie of alleged criminal responsibility to Ms. Jensen (and Human Resources) has been severed due to the conspiracy acquittal, and that there is reason to re-evaluate whether the participant findings can be sustained.

While the Court previously found that Mr. Reyes oversaw the participation of Ms. Jensen, this finding is inconsistent with the jury's conspiracy acquittal because the verdict indicates that the jury found no "criminal partnership" or "agreement" between them to commit any of the substantive crimes for which Mr. Reyes was convicted. (Jury Instructions (Dkt. No. 1158) at 19–20.) Indeed, Ms. Jensen is the *only person* that the Court previously identified as a participant for sentencing purposes (Order at 12:11–12) and, importantly, the sole alleged co-conspirator throughout the trial (RT, Vol. 16 (Mar. 22, 2010) at 2823:1–3 ("[T]here was a conspiracy, in this instance, with [Stephanie] Jensen . . . And the conspiracy is an agreement or partnership to commit a crime."); Jury Instructions at 19–20). In fact, the Court—during Ms. Jensen's first sentencing—explained that the aggravating role "enhancement for Reyes was appropriate *because* he organized Jensen's involvement." (Jensen Order at 12:20–21 (emphasis added).)[6] It is not enough to use a "but for" test (*i.e.*, the crime would not have been committed but for defendant's participation); there must be evidence that the defendant exercised some

[6] Following the Ninth Circuit remand for resentencing without the obstruction of justice enhancement, the Court otherwise applied the same enhancements as it did in Ms. Jensen's first sentencing. (Jensen RT (Jan. 6, 2010) at 2:21–3:1.) While the Court stated there was a two level adjustment for the "role in the offense" (*id.* at 2:25), this enhancement was for an "abuse of trust" under section 3B1.3. (Jensen Order at 12:26–28 (no aggravating role enhancement under section 3B1.1); 15:23–17:17 (abuse of trust enhancement appropriate under section 3B1.3); and 23:7–8 (summarizing the same).)

control over others involved or was responsible for organizing others for the purpose of carrying out the crime. *United States v. Harper*, 33 F.3d 1143, 1151 (9th Cir. 1994).

The government also relied heavily on Ms. Jensen as the conduit through which Mr. Reyes conducted the alleged conspiracy, depicting him as the mastermind who "could not have committed this crime [of backdating] without [Ms. Jensen's] help." (RT, Vol. 3 (Feb. 22, 2010) at 270:25–271:1; *see also id.* at 270:16–20.) And although it argued in closing that a conspiracy conviction was warranted because the jury could "see the existence of the plan" and "see the existence of the agreement, in the coordinated way in which people [went] about their activities with regard to the stock options at Brocade" (RT, Vol. 16 (Mar. 22, 2010) at 2823:25–2824:2), the jury did not find any such coordination established a backdating conspiracy.[7] Due to the Court's focus on Ms. Jensen as the sole criminally responsible person controlled by Mr. Reyes during the first sentencing, Mr. Reyes requests that the Court consider the effect of his conspiracy acquittal on this finding.

In addition, the Court should evaluate whether employees in Human Resources can properly be considered "criminally responsible" under section 3B1.1 without a "criminal partnership" with Ms. Jensen. The government relied heavily on witness testimony that Stephanie Jensen directed her department to backdate options for Mr. Reyes and, thus, they were participants in the fraud through Ms. Jensen. (RT, Vol. 3 (Feb. 22, 2010) at 271:18–21 ("these witnesses will tell you that Stephanie Jensen directed them to look back over the stock performance history and select or highlight . . . the low prices"). Based on the evidence presented by the government at trial, the *only way* that Mr. Reyes could have possibly led or organized HR is through Ms. Jensen. (*See, e.g.*, *id.* at 271:10–11 ("You will learn that Stephanie Jensen would come to these witnesses to begin the option-granting process.") & 271:18–21

[7] Mr. Reyes anticipates that the government will argue that the outcome regarding five or more participants should not change because Mr. Reyes was convicted on Count Two (Scheme to Defraud) and involved others in his scheme. However, a scheme to defraud is distinct from a conspiracy. (RT, Vol. 16 (Mar. 22, 2010) at 2824:3 (stating in the government's closing that "a conspiracy is different from a scheme").) There is nothing inherent in the Count Two conviction from which the Court can imply a finding by the jury that there were five or more participants nor that he controlled any one participant for the purposes of section 3B1.1. (Jury Instructions (Dkt. No. 1158) at 22; Verdict Form (Dkt. No. 1165).)

("Next, these witnesses will tell you that Stephanie Jensen directed them to look back over the stock performance history and select or highlight, with a yellow highlighter, the low prices.").) Further, the evidence makes clear that these witnesses rarely, if ever, had direct interactions with Mr. Reyes on any HR-related topic, let alone conversations about stock options. (*See, e.g.*, RT, Vol. 8 (Mar. 2, 2010) at 1309:8–13 (Beyer never discussed stock options, option pricing, or accounting for options with Mr. Reyes).) Because the government's only connection to Mr. Reyes and the HR employees who supposedly carried out his backdating was through Ms. Jensen, the Court should re-evaluate whether any HR employee can be deemed a criminally-responsible participant under section 3B1.1.

Moreover, this Court has already determined that Ms. Jensen did not control any "participants" for sentencing purposes, finding "there [wa]s no evidence that Jensen managed any other criminally responsible person (that is, a person who not only backdated option grants but did so with the requisite mens rea)." (Jensen Order at 12:21–23; *see id.* at 12:9 (enhancement not appropriate because she did not manage or supervise one or more other participants). The Court also recognized that the government's theory in Ms. Jensen's case—which was argued no differently against Mr. Reyes—"was that there were no criminally responsible parties other than Jensen and Reyes." (*Id.* at 12:24–25.) Mr. Reyes's prosecution provided no additional evidence to change the finding regarding whether "Jensen exercised control over at least one other participant." (*Id.* at 12:16–17.)

The lack of criminal partnership between Mr. Reyes and Ms. Jensen and the government's reliance on Ms. Jensen as the conduit for Mr. Reyes's crimes undermines finding individuals in the Human Resources department as "participants" in a criminal activity. Mr. Reyes submits that the Court's previous finding must be revisited.

2. Mr. Reyes was not the leader or organizer of an "otherwise extensive" criminal activity.

In light of changed factors, the Court should also reconsider its finding that there was an otherwise extensive criminal activity, which the Court found applicable by focusing on the number of knowing "participants" and "unwitting outsiders." (Order at 12:17–25.) Neither the

conduct of the Finance Department, Board of Directors, nor Human Resources Department should be considered to have been unwitting outsiders or participants such that their conduct made Mr. Reyes's criminal activity "otherwise extensive."

The Court should not consider the Finance Department as having been unwittingly duped by Mr. Reyes based on the Ninth Circuit opinion in *United States v. Reyes*. *See* 577 F.3d 1069, 1076 (9th Cir. 2009) (noting "[s]tatements made to the FBI by responsible employees in the Finance Department during the FBI's investigation established that Finance Department executives knew about the backdating"). It simply was not the case that the "Finance Department did not know of the backdating, and thus [was] powerless to get the accounting right" (*id.*), and thus the government was foreclosed from repeating such an argument again at this trial. The government, importantly, did not assert that Finance was part of the conspiracy with Mr. Reyes.[8] Simply put, the evidence in this trial does not allow for a finding that employees in the Finance Department were criminally responsible participants or unwitting outsiders to Mr. Reyes's criminal activity.

Similarly, the Board of Directors cannot be deemed unwitting participants because the evidence at this trial showed that the Audit Committee backdated options to themselves—namely, the April 17, 2001 grant. (*See* RT, Vol. 10 (Mar. 4, 2010) at 1806:14–22, 1813:5–23, 1821:5–25, 1822:14–1823:4, 1831:2–5, & 1838:22–1840:3 (Miotto unable to conclude that Apr. 17, 2001 director grants were not backdated); *see also* Trial Ex. 2375 (unanimous written consent dated Apr. 17, 2001, granting options to Audit Committee members Dempsey, Leslie, Neiman, and Sonsini); Trial Ex. 2382 (minutes of a board meeting, dated Apr. 20, 2001, indicating that no board meeting took place on Apr. 17, 2001).) At the same time, the Board

[8] In fact, the government downplayed the importance of what key players in the Finance Department knew. (*See* RT, Vol. 16 (Mar. 22, 2010) at 3016:2–8 ("The defense has insisted that these e-mails show that [CFO] Mike Byrd knew about the backdating at Brocade. Okay. But what Mike Byrd knew and did not know about the backdating scheme does not help you answer the real question of what Mr. Reyes knew . . . . Nor is what Mike Byrd knew particularly relevant.").)

members were never argued to be criminally responsible in any shape or form for backdating, nor were they alleged to be part of the conspiracy.[9]

The conduct of employees in the Human Resources department in carrying out stock option administration also does not make Mr. Reyes's criminal activity extensive. In and of itself, the stock-options program at Brocade was not illegal (Jury Instructions at 37 (backdating is not a violation of securities laws)), and the legitimate activities performed by HR in administering stock options have no bearing on Mr. Reyes's criminal activity.[10] Indeed, stock options were issued as part of a routine corporate practice—authorized by statute and by Brocade's bylaws—and was itself a legitimate form of granting compensation to employees. And even despite the government's broad statements that "Greg Reyes backdated" (*see generally*, RT, Vol. 3 (Feb. 22, 2010) at 270:16–20), Mr. Reyes was not convicted of simply selecting grant dates with hindsight. The "crime" at issue here was that grant dates had not been properly disclosed to investors and, as a result, certain accounting charges were not disclosed in financial statements and SEC filings. There is no doubt that HR itself had no involvement with preparing financial statements and SEC filings, nor ensuring that these documents contained proper compensation charges. As such, HR employees should not be considered unwitting participants in Mr. Reyes's criminal activity, as they were merely carrying out their duties and responsibilities relating to stock option administration.

Finally, increasing Mr. Reyes's sentence based on an authority that was the result of his corporate leadership position (which was entirely lawful activity) undermines the intent of the

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[9] Again, the government downplayed the importance of what the Board knew about options. (*See* RT, Vol. 16 (Mar. 22, 2010) at 3045:1–4 ("[Y]ou really do not have a solid record to divine what the board at Brocade did and did not know. And what the board members did and did not know does not help you answer the real question of what Mr. Reyes knew . . . .").)

[10] The stock options and practices put at issue by the government constituted only a small portion of the stock option administration process at Brocade and the overall responsibilities of HR. Most of the activities relating to the administration of the stock options program—such as selecting the option price, determining grant amounts, collecting and verifying personnel data for grant documentation, preparing grant minutes, and correcting errors in grant documentation—were routine and legitimate actions that any company granting options would perform. The offense conduct in this case involved participation by the HR department that was no more "extensive" than its regular and legitimate job responsibilities.

Sentencing Commission that a defendant have led a criminal organization,[11] and is thus tantamount to an increase for simply being an officer of Brocade. In *United States v. DeGovanni*, the court found that defendant's "sergeant-status in the police department as an overall supervisor of other police officers . . . was not enough to substantiate an enhancement for *active* supervision of *other members* of th[at] conspiracy." 104 F.3d 43, 46 (3d Cir. 1997) (emphasis in original). Corporate leadership does not equal criminal leadership. *United States v. Litchfield*, 959 F.2d 1514, 1523 (10th Cir. 1992) (leadership enhancement improper, in part, where "defendant might be termed an organizer or leader of the mining operation, [but] that operation was not itself criminal activity"); *DeGovanni*, 104 F.3d at 46 ("[T]he mere fact that [defendant] was the[] workplace supervisor[] is not enough to render him more culpable *for purposes of the conspiracy* .") (emphasis in original); *see also United States v. Starnes*, 583 F.3d 196, 217 (3d Cir. 2009) (district court "properly gave no weight to [defendant's] formal job title in assessing whether he should be characterized as an organizer"); *see* U.S.S.G. § 3B1.1, App. Note 3.

3. Enhancements for holding a position as an officer of a public company and for the authority that Mr. Reyes held by virtue of his position account serve to punish him twice for the same conduct.

"Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States v. Martin*, 278

[11] The aggravating role enhancement is intended to "increase the offense level based upon the size of a *criminal organization* (*i.e.*, the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense." U.S.S.G. § 3B1.1, App. Note Background (emphasis added). Without having proven there was a conspiracy, there is no organization that can properly be deemed "criminal" for sentencing purposes, unless that criminal organization is Brocade itself. Further, without "leading" a criminal organization, there is no comparison for the "degree to which [he] was responsible" for the crimes underlying conviction, which is contemplated by the Sentencing Guidelines. *See* U.S.S.G. § 3B1.1, App. Note Background. The Guidelines did not contemplate an aggravating role when there is only one defendant's offense conduct. *See United States v. Thomas*, 510 F.3d 714, 725 (7th Cir. 2007) (distinguishing the leadership enhancement as being applied for defendant's "leadership role in the *conspiracy*" compared to his leadership role as the chairman of the committee through which he perpetrated the crime); *United States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993) ("The leadership enhancement addresses a somewhat different concern, namely [defendant's] role within the group of coconspirators.").

F.3d 988, 1004 (9th Cir. 2002) (internal quotations and citations omitted); *United States v. Thornton*, 511 F.3d 1221, 1227–28 (9th Cir. 2008) (same). In evaluating the issue of double counting in the first sentencing, the Court stated that the aggravating role enhancement was intended to punish Mr. Reyes for "bring[ing] in, either knowingly or unknowingly, wittingly or unwittingly, a number of individuals in order to . . . accomplish the purposes which he set out to do." (RT (Jan. 16, 2008) at 16:13–16.) Mirroring the evidence supporting the conspiracy count in the first trial, the Court held that the aggravating role enhancement applied *because* Mr. Reyes "could not have done [it] alone." (*Id.* at 16:12–13.) The jury's inability to find a conspiracy and the evidence showing senior finance officers' and board members' awareness of backdating suggest that the previous double counting finding should be revisited.

In applying the aggravating role enhancement, the Court focused primarily on Mr. Reyes's exercise of authority to backdate employee grants by signing board minutes, management letters, and certifications. (Order at 12:10–12.)[12] As discussed in the previous section, however, the authority to grant employee options was granted to Mr. Reyes by virtue of his position at Brocade as CEO. In fact, the Board approved this delegation of authority to him, as CEO, and the company's bylaws allowed for such authority.

As discussed above, Mr. Reyes submits that the offense conduct here does not qualify for the aggravating role enhancement. However, even if the government were correct that this offense conduct could technically qualify for the enhancement under the terms of the Guidelines' language, the enhancement would be duplicative as applied on these facts: Securities fraud necessarily involves the making of false or materially misleading statements or omissions in SEC filings, and if the offense conduct here were to qualify for the enhancement, it is hard to imagine an officer of a publicly traded company who would *not* face an aggravating-role

[12] Although the Court focused heavily on decision making authority, there are a number of factors to be considered in determining whether the defendant was a leader of a criminal activity. They include: the exercise of decision making authority; the nature of participation in the commission of the offense, the recruitment of accomplices; the claimed right to a larger share of the fruits of the crime; the degree of participation in planning or organizing the offense; the nature and scope of the illegal activity; and the degree of control and authority exercised over others. (Order at 12:4–9, citing U.S.S.G. § 3B1.1, App. Note 4.)

enhancement based on five or more witting or unwitting participants or an extensive criminal activity. A public company's processes for complying with SEC filings necessarily involves five or more persons, and could always be deemed "extensive" because information must be compiled from different departments, consolidated, and reviewed prior to filing. If "unwitting" involvement of any person is the standard for a participant or extensiveness, then any officer is automatically subjected to an aggravating role enhancement on top of the public officer enhancement. If the offense conduct here were to qualify, a finding of five participants and/or extensiveness would be inevitable for any public officer committing securities fraud—even though the public-officer enhancement would already apply. What separates this case from those in which the Sentencing Commission intended the enhancement to apply is that Mr. Reyes did not orchestrate a conspiracy (*i.e.*, lead a *criminal organization*), as evidenced by the jury's verdict.

E. The Court Should Not Apply an Enhancement for Obstruction of Justice.

Notwithstanding the Court's previous decision to impose an enhancement for obstruction of justice, Mr. Reyes respectfully submits that this enhancement should not be applied on resentencing. In light of the changed circumstances in the retrial, the record does not support a finding that Mr. Reyes "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction" (U.S.S.G. § 3C1.1(A)) in submitting the declaration relating to co-defendant Stephanie Jensen's motion for severance (*see* Dkt. No. 763-1). Specifically, Mr. Reyes respectfully requests that the Court reconsider this issue given that the declaration was prepared and submitted by Mr. Reyes's previous counsel before the first trial. Mr. Reyes retained new counsel for his defense in the retrial and the Court has had the opportunity to observe the defense try this case. The Court properly excluded the declaration from trial (*see* RT, Pretrial Conf. (Feb. 16, 2010) at 5:21–14:16), and in light of the defense in this trial, Mr. Reyes respectfully submits that circumstances have changed sufficiently to reconsider the enhancement.

Moreover, the defense continues to view the most plausible interpretation of the declaration as the description by the United States Probation Office in the Final PSR disclosed on December 28, 2007, which concluded in the Addendum at pg. 2, ¶ 11, that "the statements were recollections of past discussions with Jensen and were not intended to posit a statement on the more general issue of backdating, it is not clear that his intent was to mislead the court or that his statements were wholly inconsistent with later statements made by counsel." This interpretation of the declaration was further supported by Jan Little, Ms. Jensen's defense counsel. (*See* Letter from Jan Little to U.S. Probation Officer Cheryl L. Simone (Dec. 26, 2007), at 1 ("Because I submitted [Mr. Reyes's] declaration on behalf of Ms. Jensen, I thought it important to make clear to you that I believed at the time it was submitted, and I still believe, that the declaration is accurate. I also do not believe the Declaration is inconsistent with any positions taken by Mr. Reyes' counsel at his trial."), attached as Ex. U to the Declaration of Neal J. Stephens in support of Def.'s Principal Sentencing Memorandum ("Stephens Decl.").) As provided by the Commentary to section 3C1.1, Mr. Reyes requests that the Court consider that "inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice." U.S.S.G. § 3C1.1, App. Note 2 ("Limitations on Applicability of Adjustment").

For these reasons, Mr. Reyes respectfully requests that the Court reconsider its prior conclusion that an enhancement should be applied for willful obstruction of justice.

VI. A DOWNWARD VARIANCE FROM THE GUIDELINE RANGE IS APPROPRIATE BASED ON THE SPECIFIC FACTS IN THIS CASE.

"A district court may depart from the applicable Guideline range if it finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *United States v. Parish*, 308 F.3d 1025, 1029 (9th Cir. 2002) (citing U.S.S.G. § 5K2.0 (policy statement)). The court should depart downward because: (1) the adjusted offense level substantially overstates the seriousness of Mr. Reyes's

backdating offenses; (2) the combined effect of the enhancements produces an unreasonable and unduly harsh result; and (3) family circumstances warrant leniency from this Court.

A. The Guideline Range Substantially Overstates the Seriousness of the Offense.

Mr. Reyes respectfully requests that the Court should apply a downward variance in the adjusted offense level because his conduct was outside of the "heartland" of typical securities fraud cases. The Sentencing Commission "intend[ed] the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departure is warranted." U.S.S.G. Ch. 1 Pt. A, 4(b); *see Koon v. United States*, 518 U.S. 81, 95 (1996) (first question that a sentencing court should ask in considering a departure is whether the case is outside the Guidelines' heartland and make it a special or unusual case).

While the government—for the first time in three years of litigation—claimed that Mr. Reyes was the primary intended beneficiary of Brocade's backdating, this stands starkly in contrast to the government's arguments for motive at the first trial. (RT, Pretrial Conf. (Feb. 16, 2010) at 82:8–83:1.) But the primary evidence of this new motive was simply the government expert's suppositions regarding the "correct" grant dates for certain option grants made to Mr. Reyes, based on which the expert further testified, based also on supposition, regarding the amount that Mr. Reyes supposedly gained from the sale of Brocade stock. (*See* RT, Vol. 11 (Mar. 8, 2010) at 2056:23–2062:4 (Fujimoto testimony).) Tellingly, no fact witness testified in support of the government's personal profit theory.

The conclusion that this case falls outside the heartland of securities-fraud offenses is further supported by the fact that the only evidence presented for "personal gain" related to an

option outside of the indictment period.[13] The government elicited testimony that "of the options that Mr. Reyes received in the period 2000 through 2004," the only options exercised were the 40,000 shares granted on November 19, 1999, for a pre-tax gain of $2,995,626. (RT, Vol. 11 (Mar. 8, 2010) at 2062:25–2063:21, 2065:8–2066:19 & 2067:15–22.) The government indicated that it intended to show that Mr. Reyes, by merely having the option to purchase shares in 1999, understood that stock would be more valuable if expenses were lower and revenue was higher. (*See* RT (Feb. 19, 2010) at 241:13–17 & 242:1–25.) To the extent that the government sought to put into evidence that Mr. Reyes benefitted from the 1999 stock grant, the parties previously stipulated and the Court instructed the jury, that "Mr. Reyes sold a significant amount of Brocade stock on dates between 2000 and 2004." (RT, Vol. 10 (Mar. 4, 2010) at 1975:7–8.)

The government presented no new documentation or testimony from any fact witnesses that proved up this motive to personally profit. To the contrary, witnesses testified that Brocade used stock options to attract and retain talented employees, to remain competitive with other companies, and to benefit its employees.[14] The fact that stock options were used to reward rank and file employees is one of the reasons that this case is atypical of the body of securities-fraud cases. *See United States v. Whitmore*, 35 Fed. App'x 307, 321 (9th Cir. 2002) (unpublished disposition) (applying downward departure as a case outside of the heartland of bank fraud cases where defendant was motivated to enhance the bank and eventually save it, not harm it).

B. The Adjusted Offense Level, if Enhancements Other than the Public-Offer Enhancement Are Applied, Significantly Overstates the Seriousness of the Offense.

As the Guidelines themselves recognize, "[t]here may be cases in which the offense level . . . substantially overstates the seriousness of the offense. In such cases, a downward

[13] Mr. Reyes further notes that the portion of the indictment on which the government relied to justify its "personal profit" theory relates directly and exclusively to the mail-fraud charges in Counts 3 and 4 that the government voluntarily dismissed before the first trial. (*See* Indictment (Dkt. No. 23) at ¶ 16.)

[14] *See, e.g.*, RT, Vol. 7 (Mar. 1, 2010) at 1142:9–12 (Beyer testimony that "[a]ttracting and retaining employees was a real issue for the company. In that case, my belief was that there was an economic value to the company, to be had by having people off of the job market [by recruiting and retaining employees using stock options]."); *id.* at 1236:11–14 (Beyer testimony that Brocade, like other "[h]igh-technology companies in Silicon Valley," used options "as a tool to not only attract top-level technicians, engineers, finance professionals, to the companies, but also to retain them.").

departure may be warranted." U.S.S.G. § 2B1.1, App. Note 19(C). Based on the factors discussed in this memorandum, if the Court imposes enhancements beyond the public-officer enhancements under section 2B1.1(b)(17)(A), Mr. Reyes submits that the Adjusted Offense Level (*i.e.*, any Adjusted Offense Level greater than 11) will substantially overstate the seriousness of offense. *See United States v. Reese*, 2 F.3d 870, 895 (9th Cir. 1993) ("There is, of course, such a thing as impermissible double counting. It occurs where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines. In practical terms, this means that impermissible double counting is to be found where one Guidelines provision 'is akin to a 'lesser included offense' of another,' yet both are applied.") (internal citation omitted).

C. Mr. Reyes's Family Circumstances Have Changed and He Requests that the Court Consider Recent Events in Imposing His Sentence.

Post-*Booker*, "courts can justify consideration of family responsibilities[] [as] an aspect of the defendant's 'history and characteristics' [under section 3553(a)(1)] for reasons extending beyond the Guidelines." *United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006). In the first sentencing, the Court stated that downward variances for extraordinary family circumstances "generally involve situations where the defendant is an irreplaceable caretaker of children, elderly, or a seriously ill family member." (RT (Jan. 16, 2008) at 12:6–14.) Further stating that the extent of an appropriate variance "serves to protect those family members from the defendant's prolonged incarceration[,]. . . [i]n the Court's opinion, Mr. Reyes ha[d] not demonstrated that he is the only person who can tend to issues raised by his family's circumstances." (*Id.* at 12:14–19.) Given changed circumstances, Mr. Reyes requests that the Court consider the needs of his family in exercising its discretion under section 3553. *See Menyweather*, 447 F.3d at 634 (district courts have discretion to consider "family ties and responsibilities" as mitigating factors) (quoting *United States v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (emphasis omitted)).

In particular, and as the Court was previously apprised through numerous letters to the Court, any sentence in this case should account for the tremendous impact that the prosecution and looming sentence has had on both of Mr. Reyes's children, Greg Jr., (now 16 years old) and Rebecca (now 12). (*See* Appendix C to Decl. of Ronda McKaig in Support of Admin. Mot. to File Selected Letters to the Court Under Seal (Dkt. No. 688).) As illustrated by the updated letters submitted under seal, Mr. Reyes's children have continued to bear a heavy burden—and in nearly every respect that burden and its ill effects have grown more severe since the last sentencing. (*See* Letter from John Pina, Ph.D., Letter from Julie Collier, Ph.D., and Letter from Penny Reyes, attached as Exs. R, S, and P, respectively, to Stephens Decl.) Mr. Reyes urges the Court to read these letters and consider the risk that Greg Jr.'s and Rebecca's well-being "will deteriorate if defendant is incarcerated." *United States v. Sclamo*, 997 F.2d 970, 973–74 (1st Cir. 1993) (affirming downward departure where there is "evidence of an exceptional kind of relationship and an exceptional risk of harm to a child if that relationship is broken," citing to psychologist's reports at sentencing hearing); *United States v. Link*, 122 F. Supp. 2d 907, 909 (N.D. Ill. 2000) (applying downward departure for extraordinary family circumstances where defendant had "an unusual bond [with his emotionally fragile son] from a psychiatric point of view," citing psychiatrist's conclusions).

VII. CONSIDERATION OF THE FACTORS IN 18 U.S.C. § 3553 SUPPORT A BELOW GUIDELINES SENTENCE.

Following the decision in *United States v. Booker*, the Sentencing Guidelines are advisory. 543 U.S. 220, 245 (2005). A district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and this range is to be used as an initial benchmark for the sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). While the court must calculate the Guidelines range, it "may not presume that the Guidelines range is reasonable." *Gall*, 552 U.S. at 39.[15] As such, the court must "consider all of the § 3553(a)

[15] *See also United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) ("But where, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case."); *United States v. Parris*, 573 F. Supp. 2d

factors to determine whether they support the sentence requested by a party." *Gall*, 552 U.S. at 49–50.

Section 3553 of Title 18 provides that a district court shall impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes set forth in [sub-section (a)(2)]," namely:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

A district court shall also consider: the nature and circumstances of the offense and the history and characteristics of the defendant; the kinds of sentences available; the sentencing range established by the Sentencing Guidelines; any pertinent policy statements issued by the Sentencing Commission; the need to avoid unwanted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a)(1) & (3)–(7).

A. Nature and Circumstances of the Offense and History and Characteristics of the Defendant (18 U.S.C. § 3553(a)(1))

Both the nature and circumstances of Mr. Reyes's offenses and his history and characteristics weigh strongly in favor of a below guideline sentence. Mr. Reyes was convicted of securities fraud, falsifying company books, records, and accounts, and making false statements to accountants of Brocade—all relating to the failure to take proper accounting charges relating to stock options. Mr. Reyes was acquitted of conspiracy to commit any of these offenses.

744, 751 (E.D.N.Y. 2008) (a court should avoid "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on [defendants] if not cabined by common sense") (citing *Adelson*, 441 F. Supp. 2d at 512)).

1. Nature of the Offense

Mr. Reyes was convicted of violating APB 25, an accounting opinion which required a company to record non-cash stock option compensation expenses whenever it granted "in-the-money" stock options. Prior to Mr. Reyes's indictment, no one had ever been criminally prosecuted for violating APB 25 or failing to disclose non-cash expenses relating to stock options. As a result, the nature of the offense is relatively new to the legal landscape and although almost three years have passed since the first trial, there were very few executives charged in criminal cases (and even fewer prosecuted successfully) after it was revealed that hundreds of companies had backdated option grants in the 2000–2004 time period, and no criminal cases involving any alleged backdating that would have occurred after the issue became a media event in 2006.

Non-cash stock option compensation expenses are accounting entries on a financial statement which are required under Generally Accepted Accounting Principles ("GAAP"). They do not reflect actual cash flow in or out of a company, but reflect an estimate of the value of options at a given moment in time, similar to a company's good will. The option itself has no cash value unless and until it is exercised; and where, as here, options cannot be exercised for a substantial period of time (typically 1–4 years) after the grant, any estimate based on hypothetical exercise on the date of the grant is at best highly speculative. Despite Brocade's restatement of over $300 million in non-cash expenses, its cash positions did not change by even one cent as a result of the offense conduct. Importantly, 95% of the options at issue in Mr. Reyes's case were never exercised, and thus there was never any cash impact in or out of Brocade for those option grants.

Testimony during trial demonstrated that Brocade's investors and analysts were primarily concerned with costs impacting a company's cash position and were not concerned with non-cash compensation expenses such as those understated by Brocade. The government's investor witnesses did not testify that they had actually considered non-cash stock option compensation expenses in deciding to purchase or sell Brocade stock. (*See* RT, Vol. 12 (Mar. 9, 2010) at 2298:2–5 (Kilgannon did not look at 10-Ks); *id.* at 2298:6–13 (Kilgannon did not look at

GAAP income statement); *id.* at 2331:25–2332:1 & 2332:24–2333:5 (Ryan did not read 10-Ks, never looked at earnings per share, and never looked at net-income numbers).) Indeed, the trial testimony of the only finance witness called at trial, Richard Deranleau, established that revenue and the company's true operating condition could be obscured by non-cash expenses. (RT, Vol. 7 (Mar. 1. 2010) at 1139:15–25 (APB 25 disclosure is "unhelpful to the investors and the investment community" because they "are not seeing the underlying performance" of the company.) Moreover, analyst reactions to Brocade's January 6, 2005 restatement announcement—each of whom retained their existing buy or hold recommendations—demonstrates that the market did not view the company's earlier omission of APB 25 expenses as material buying or selling decisions. (*See* Report of Kenneth M. Lehn (Dkt. No. 1184-1), at ¶ 30, pgs. 15–16 (collecting analyst commentary to restatement announcement).)

Further, the information that Mr. Reyes was convicted of concealing—indeed, *better* information—was fully disclosed in notes to Brocade's financial statements under FAS 123. Had investors been concerned about the information that Mr. Reyes had "concealed," that information was—and had always been—at their fingertips throughout the period of grants at issue. This point was confirmed by numerous witnesses. (See RT, Vol. 8 (Mar. 2, 2010) at 1451:1–9 & 1472:23–1473:23 (Bowie testifies that FAS 123 is more informative disclosure and better piece of information for investors than APB 125); RT, Vol. 6 (Feb. 25, 2010) at 1032:18–21, 1041:3–18 & 1042:4–24 (Deranleau testifies that FAS 123 disclosures in Brocade's SEC filings fully disclosed option expenses); RT, Vol. 12 (Mar. 9, 2010) 2292:17–2293:3 (Kilgannon testifies that stock option expenses disclosed in 10-Ks from 2000–2003 indicated how financial statements would have looked after accounting for stock option expenses); *id.* at 2339:2–13 & 2339:22–2340:4 (Ryan testifies that FAS 123 disclosures would have been absorbed into market and factored into Brocade's stock price).)

In light of this evidence, the offense conduct here simply does not fall within the realm of common securities fraud conduct, such as artificially inflating stock prices by adding false revenue or hiding cash expenses to meet earnings estimates. Moreover, Brocade thrived under Mr. Reyes's tenure and under his leadership and with the use of stock options to retain a talented

work force, the company grew from approximately one hundred employees to almost 1,300. (*See* RT, Vol. 3 (Feb. 22, 2010) at 280:15–16 ("[I]t's true that Greg Reyes built Brocade into a Silicon Valley success story.") Even today, Brocade remains a successful company; it continues to provide value to its shareholders and to the public.

Another fact that sets this case apart from the typical corporate fraud case is that APB 25 was widely misapplied by many other companies, especially Brocade's peer companies in the high-tech industry and in the Silicon Valley. (*See, e.g.*, RT, Vol. 10 (Mar. 4, 2010), at 1856:18–21 (Miotto agrees that "there were a large number of companies that ended up doing restatements as a result of options that had been backdated").) Over 250 companies launched internal investigations or been the subject of government investigations into options backdating and over 130 companies have restated their financials because of their failure to properly record option expenses under APB 25. (*See* Testimony Before U.S. Senate Banking Committee (Sep. 6, 2006) at 3, filed as Ex. 7 to Declaration of Ronda J. McKaig (Jan. 10, 2008); *see also* RT, Vol. 12 (Mar. 9, 2010) at 2267:20–2268:3 (reading stipulation that "[a] substantial number of public companies . . . restated their financial reports to recognize additional noncash stock-based compensation.").) Indeed, the Court has heard testimony by government's own witnesses demonstrating that Brocade was not unique in its misinterpretation of APB 25 generally,[16] nor, as evidence within and without the trial record shows, was Brocade alone in using historical look-backs to price stock options.[17] *Cf. City of Westland Police & Fire Ret. Sys. v. Sonic*

[16] *See, e.g.*, RT, Vol. 10 (Mar. 4, 2010) at 1783:23–24 (Miotto testimony that "I'm not familiar with all the literature. If I have an issue, I call an expert."); *id.* at 1784:3–8 (Miotto: "Q. I mean, the literature on stock options and how you account for stock options is extensive, and it's elaborate and it's confusing. Would you agree with that? A. Extensive, and it's elaborate, and sometimes it's confusing."); RT, Vol. 3 at 381:4–382:7 (Bidzos' testimony that VeriSign backdated options and had to restate financials as result); RT, Vol. 12 (Mar. 9, 2010) at 2267:20–2268:3 ("A substantial number of public companies, many of them Silicon Valley technology companies, disclosed in their public filings that they backdated stock options without taking a corresponding compensation charge. As a result, these companies restated their financial reports to recognize additional noncash stock-based compensation. Not all relevant details about the stock option granting practices at these companies were disclosed in their public filings." (Stipulation)).

[17] *See* RT, Vol. 8 (Mar. 2, 2010) at 1352:1–1354:16 (cross-examination of Beyer showing intentional backdating at KLA-Tencor); *see generally* Def.'s Mot. for New Trial Pursuant to Rule 33 (Dkt. No. 1176) at 3–10.

Solutions, No. C 07-05111 CW, 2009 WL 942182, at *6 (N.D. Cal. Apr. 6, 2009) ("[C]ourts have concluded that APB No. 25 is a complex rule, and that a misapplication of APB No. 25 cannot be construed as a glaring example of scienter because the measurement date criteria embodied in APB No. 25 are far from obvious." (internal quotations omitted)); *Weiss v. Amkor Tech., Inc.*, 527 F. Supp. 2d 938, 949 (D. Ariz. 2007) ("[T]he accounting rules at issue, specifically APB No. 25, are complex and require accounting expertise and judgment.").

2. Mr. Reyes's Personal History and Characteristics[18]

Perhaps the most fundamental factor in any sentencing is the personal history and characteristics of the defendant.[19] *See* 18 U.S.C. § 3553(a)(1). Over 300 letters were submitted to the Court in support of Mr. Reyes during the first sentencing, and Mr. Reyes appreciates that the Court took the time to review all of the letters before his initial sentencing. He respectfully requests that the Court keep those letters in mind as it again considers an appropriate sentence, and hopes that the Court will specifically review Appendix A, a smaller subset of letters that were previously identified as the most important for the Court to review. (*See* Appendix A attached to the 11/16/07 Declaration of Ronda McKaig.) These letters describe a man who has lived a life of great purpose, and who has left an impression and positive impact on everyone he has touched. There is a unifying theme running through these letters—our lives have been made better because of Greg Reyes. The letters speak of many things, including Mr. Reyes's good character, his compassion, his philanthropy, and devotion to his family. They tell the story of an ethical businessman and caring employer who inspired people to achieve their goals, took time

[18] Mr. Reyes will not repeat the entirety of his personal history here, which is contained in his previous sentencing memorandum (filed Jan. 9, 2008 under seal) and the pre-sentence report. Mr. Reyes does, however, wish to bring to the Court's attention certain items relating to this personal characteristics.

[19] Courts have recognized that the Guidelines can "fail[] to take into account defendant's positive personal characteristics, including his excellent employment record, family ties and community involvement." *United States v. Milne*, 384 F. Supp. 2d 1309, 1312 (E.D. Wisc. 2005) ("[G]uidelines sometimes are insufficiently sensitive to personal culpability."). Mitigating factors that a court may consider include defendant's history of strong employment, family support, and the absence of potential risk to the public. *United States v. Ruff*, 535 F.3d 999, 1001 (9th Cir. 2008); *see also United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008) (court may properly consider, under section 3553(a)(1)–(2), that a defendant's crime "[di]d not pose the same danger to the community as many other crimes," defendant's attempts to building an honorable life, and how defendant's daughter depended on him).

to get to know his employees, and always insisted on doing things with integrity and honesty. They also tell the story of a loving father and a devoted husband, and a man who cares about his community and helps people in need, often silently and without being asked to do so. They tell the story of a good man, who is deserving of compassion.

In addition to the letters previously submitted, Mr. Reyes has submitted to the Court a small collection of additional letters from family, friends, and those who have been touched by Mr. Reyes's selfless and charitable acts after his first sentencing. (*See* Letters attached as Exs. A–L & N–O to Stephens Decl.) Through his personal struggles over the past few years, Mr. Reyes has not lost sight of the values he has exemplified all throughout his life. He has devoted himself to friends going through tragic and difficult times—whether it be waiting days at the hospital during surgeries, being a caretaker in a spouse's absence, sending home cooked meals, and frequently opening up his home to friends and their families to be closer to their loved ones. (*See* Letters from Chip Virnig, Rita Piziali, Jim Weldon, Christopher Childs, and Lorinda Childs, attached as Exs. A, B, C, G & H, respectively, to Stephens Decl.) In particular, Mr. Reyes's close friend, Ken Virnig, recently died of pancreatic cancer, but Mr. Reyes remained in constant contact throughout this most recent trial and ensured that Mr. Virnig's son Chip was cared for. (*See* Letter from Chip Virnig, attached as Ex. A to Stephens Decl.) Mr. Reyes visited as often as he could, always making time to take Mr. Virnig to church every week, and encouraged Chip and his father to take the father-son trips they had always dreamed of taking. (*Id.*) Without Mr. Reyes's positivity and strength, these trips would never happened; and it is through actions such as these that Mr. Reyes has become a role model and father-figure to those in his life.

Mr. Reyes respectfully urges the Court to consider these letters, among others, as a basis for the Court's discretionary exercise of leniency in sentencing.

B. The Purposes of Sentencing Under 18 U.S.C. § 3553(a)(2) Are Satisfied With a Below Guidelines Sentence.

1. The Need to Reflect the Seriousness of the Offense, Respect for the Law, and Just Punishment for the Offense (18 U.S.C. § 3553(a)(2)(A))

Section 3553(a)(2)(A) directs a court to consider whether a sentence will sufficiently serve the purposes of reflecting the seriousness of the offense, promoting respect for the law, and

providing just punishment for the offense. A lengthy prison sentence is not necessary to serve these purposes.

The Court should consider that Mr. Reyes has already been severely punished as a result of this case. Mr. Reyes was forced to step down as the CEO and Chairman of Brocade, a company which Mr. Reyes helped build and take public, and he will never again be able to serve as a CEO, officer, or director of a public company, despite his continued desire to work.[20] Mr. Reyes's good name and reputation have also been irreparably harmed—prior to the options issues at Brocade, he was widely recognized as an honest CEO and a man of impeccable business integrity. But since the details of his criminal case have played out in numerous major news publications and throughout the legal and business communities, there is no way to undo the notoriety now associated with his name or the automatic association with his name to option backdating. In Mr. Reyes's case, a below guidelines term of imprisonment and probationary sentence are more than sufficient to afford just punishment for his crimes. Moreover, the Supreme Court has recognized that even a probationary sentence has a considerable punitive effect on offenders, in addition to special conditions that the sentencing court may impose. *Gall*, 552 U.S. at 48 (offenders on probation are subject to several standard conditions that substantially restrict their liberty and do not enjoy the absolute liberty to which every citizen is entitled); *see also Adelson*, 441 F. Supp. 2d at 514 & 15 (in imposing three and a half year sentence for "egregious" accounting fraud, court noted "an important kind of retribution [under

[20] While Mr. Reyes will be unable to continue working as an officer in any public company, this has not kept him from using his experience and knowledge to assist businesses in need. For example, Mr. Reyes has helped to save a small business owned by Mike Saldivar, the father of one of his son's friends. (*See* Letter from Mike Saldivar, attached as Ex. D to Stephens Decl.) Mr. Saldivar was looking at the closure of his business and, on a whim, asked Mr. Reyes if he would be willing to hear his business story. Mr. Reyes, through his determination and with his business acumen, devoted significant time and expense to helping Mr. Saldivar who, ultimately, was able to turn his business around using Mr. Reyes's suggestions and with his help. (*Id.*) That business today flourishes, and Mr. Saldivar and his entire staff of eight employees (and their families with young children) no longer need to worry about being put out on the street. (*Id.*) Mr. Reyes has also assisted a friend whose consulting business was destroyed by a Ponzi scheme. (*See* Letter from William Gutekunst, attached as Ex. E to Stephens Decl.) Mr. Reyes helped Mr. Gutekunst (who was facing financial devastation both for his business and his family) by speaking with banks and attorneys, and supporting Mr. Gutekunst's family until he could get back on his feet. (*Id.*) Mr. Reyes also paid Mr. Gutenkunst's legal fees and continues to assist him with debts today. (*Id.*)

section 3553(a)(2)(A)] may be achieved through the imposition of financial burdens," and that this sentence was "all that was necessary to achieve the purposes" of (a)(2)).

2. General Deterrence (18 U.S.C. § 3553(a)(2)(B))

General deterrence aims to deter others from committing crimes. A lengthy prison sentence for Mr. Reyes is not necessary to deter others from failing to properly account for in-the-money stock options. Legal and accounting requirements relating to stock options have changed significantly since the time of Mr. Reyes's offense conduct, and offenses like those Mr. Reyes was convicted of are simply not likely to happen with frequency in the future. The confusion and ambiguities that existed concerning APB 25 from 2000 to 2004 (and how to properly comply with it) no longer exist because it has since been abandoned and replaced by FAS 123R. Now, all options are required to be expensed based on their fair value, regardless of the exercise price, on the date of the grant. Moreover, Sarbanes-Oxley mandates a two-day reporting requirement for options granted to Section 16 officers. With this requirement, companies are less likely to use hindsight in granting options to officers and the potential for accounting improprieties is decreased without the ability to look back.

Further, company executives are undoubtedly aware of the risks of improper options accounting based on all the media that stock options (and individuals like Mr. Reyes) have received. Also, there is "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders." *Adelson*, 441 F. Supp. 2d at 514. From Mr. Reyes's case and the small number of backdating prosecutions that have occurred, officers of publicly traded companies recognize the potential for substantial penalties if the rules relating to stock options are not followed. *See Gall*, 552 U.S. at 54 (quoting district court opinion that "'a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing'").[21] Moreover, Mr. Reyes is

[21] *See* Scott Herhold, S.J. MERCURY NEWS (Dec. 6, 2007) ("By the last count, more than 100 companies have been embroiled in the stock-options backdating scandal. Only a handful of executives have been pursued in criminal court, though more than two dozen companies have been charged in civil actions by federal regulators. Do we really want to put all those CEOs and CFOs in jail? . . . If you throw the book

not aware of a single indictment or prosecution for option backdating based on conduct occurring after 2006. The factor of general deterrence must be considered in light of the fact that the stock option accounting rules are now clear following the abolishment of APB 25 and, likely as a result, companies are no longer confused over their obligations under the accounting rules—unlike they were from 2000 to 2004.

3. Specific Deterrence (18 U.S.C. § 3553(a)(2)(C))

Section 3553(a)(2)(c) directs a court to consider the need to protect the public from further crimes of the defendant. The aims of specific deterrence are not served by imprisoning Mr. Reyes. There is no likelihood of recidivism and he poses no threat to the public. Indeed, his charitable donations and willingness to assist others in need (often without being asked) show that he is a far cry from being a risk to the public.

Mr. Reyes has spent his entire professional career working for technology companies, going from a full time computer salesman during college, to a Vice President of Sales, to Chief Executive Officer. Prior to his conviction for securities fraud, Mr. Reyes had no criminal history and an impeccable record. He will never again work as an officer or executive at a public company, and will have no opportunity to commit a crime even remotely like what he was convicted of.[22] Nor is there any reason to believe he would be inclined to break the law; the offense conduct in this case is entirely anomalous, and Mr. Reyes is a man of high integrity who, throughout his life, has tried to do the right thing. In support of Mr. Reyes during his first sentencing, hundreds of letters from friends, family and business associates were submitted on

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at [Mr. Reyes], you will inevitably invite the accusation that justice is loaded." (filed as Ex. 4 to the Jan. 10, 2008 Declaration of Ronda J. McKaig; *see also id.* (further asking whether Brocade's failure to record expenses "was . . . so vastly different—in a sense that demands prison—from Brocade's footnoted competitors?").

[22] *See United States. v. Emmenegger*, 329 F. Supp. 2d 416, 428 (S.D.N.Y. 2004) ("Fair consideration of [section 3553(a)(2)(C)] indicates that there is less need for incarceration to protect the public from future crimes committed by this [securities and wire fraud] defendant than is typical in cases of theft. This conclusion is not based merely on [defendant's] status as a first offender, which the Guidelines take into account, or on a prediction of his future good behavior. Unlike defendants whose crimes require no special skill or position, [defendant, a registered securities broker-dealer,] yielded to a temptation and committed a crime particularly adapted to his chosen career. That career is over, and his potential to commit this particular type of crime has been eliminated.").

his behalf. (*See* Appendices A, B & C attached to the 11/16/07 Declaration of Ronda McKaig.) In addition, the letters submitted with this memorandum show that Mr. Reyes has maintained his integrity and generous spirit in the recent years.[23] (*See generally*, Letters attached as Ex. A–P to Stephens Decl.) He is simply not a man that needs a lengthy prison sentence to deter him from committing a future crime.

Moreover, Mr. Reyes faces substantial financial consequences in addition to the term of imprisonment and any probationary period imposed. Beyond his complete loss of income from his former position as CEO and director of Brocade, the SEC enforcement action against Mr. Reyes is still pending. He also paid $12.5 million to settle derivative litigations relating to options, and as a condition of that settlement, agreed to pay all legal fees incurred after May 2, 2009, out of his personal assets. (*See* Agreement between Brocade and Gregory L. Reyes dated Apr. 14, 2009 ("Brocade Derivative Settlement Agreement"), at ¶ 2, pgs. 3–4 (filed in this case as Dkt. No. 941, at 15–16).) These significant financial consequences already incurred by Mr. Reyes more than adequately serve the goal of deterrence.

C. The Kinds of Sentences Available (18 U.S.C. § 3553(a)(3))

Under section 3353(a), the Court must consider the "kinds of sentences available," including non-custodial sentences. Among these options are community confinement (U.S.S.G. § 5Fl.l), home detention (*id.* § 5F1.2), community service (*id.* § 5F1.3), and occupational restrictions (*id.* § 5F1.5). Mr. Reyes recognizes that co-defendant Stephanie Jensen received a

[23] As a few examples of Mr. Reyes's charitable donations, he donated approximately $273,000 to pay the tuition of children from families facing economic hardship so they could continue to attend Valley Christian Schools. He also donated $200,000 to Valley Christian to encourage the use of technology paradigms to increase student learning. (Letters from Clifford E. Daugherty and Werner G. Vavken, attached as Exs. I & J, respectively, to Stephens Decl.) Mr. Reyes also recently donated $10,000 to the Jewish Family Service of Greater Harrisburg (PA). (Letter from Julie Sherman, attached as Ex. F to Stephens Decl.) Having initially been brushed off by Ms. Sherman as someone unlikely to contribute to a small organization over 3,000 miles away from his home, Mr. Reyes pressed on with the JFS and donated 20% of the entire amount that it had hoped to fundraise. This donation (which he requested be anonymous) not only served as a confidence builder for Ms. Sherman and the JFS's future fundraising efforts, but it helped provide social services to the young, elderly, families, and children with special needs throughout the greater Harrisburg community. (*Id.*) Mr. Reyes's charitable acts have also touched others on a very personal level; for example, he recently paid the funeral expenses for a friend's mother-in-law, initially without his friend's knowledge. (*See* Letter from William Gutekunst, attached as Ex. E to Stephens Decl.)

sentence including a 2-month term of imprisonment, and does not suggest that a lesser term of imprisonment is mandated here. However, in light of his criminal history and the nature of the offense—and in the event the Court imposes enhancements resulting in an AOL below Zone D—Mr. Reyes requests that the Court consider the full range of sentencing options, including a non-custodial sentence. *See* 28 U.S.C. § 994(j) (noting "general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a *first [time] offender* who has not been convicted of a crime of violence or an otherwise serious offense") (emphasis added).

D. The Need to Avoid Unwarranted Sentence Disparities (18 U.S.C. § 3553(a)(6))

In criminal prosecutions for backdating, no defendant has received over 24 months imprisonment—even where an 18-level loss enhancement had been imposed.[24] Here, the government alleged there was a personal motive, but it alleged a $1.2 million "benefit" on a grant that was not within the indictment period, was clearly "not on trial" as interpreted by this Court, and should have been considered only for "motive," if at all. In short, this is not the case of widespread fraud where defendants tried to personally enrich themselves—*e.g.*, Enron, WorldCom, Adelphia, Madoff. Yet the government has sought, both in the first sentencing and today, to impose upon Mr. Reyes a punishment fit for those far more severe crimes.

Mr. Reyes also notes that co-defendant Stephanie Jensen, upon resentencing after remand, received a sentence of two-months imprisonment. This sentence resulted from the Court's reconsideration of what it previously stated would have been Ms. Jensen's sentence if

[24] *United States v. Treacy*, No. 08-CR-366, (Dkt. No. 130) (S.D.N.Y. Sept. 2, 2009) (sentencing former President and COO of Monster Worldwide, Inc., to 24 months imprisonment with two years of supervised release, after calculating appropriate guideline range of 121–151 months); NEW YORK LAW JOURNAL, *Non-Guideline Sentences For White-Collar Defendants*, Vol. 242 – No. 73 (Oct. 14, 2009);*United States v. Gerhardt*, No. 07CR00175, (Dkt. Nos. 285 & 294) (E.D. Mo. Oct. 17 & 23, 2008) (sentencing former-CFO of Engineered Support Systems, Inc., to 15 months imprisonment with two years of supervised release); *United States v. Argo*, No. 07-CR-00683, (Dkt. No. 16) (S.D.N.Y. Jan. 29, 2008) (sentencing former-CFO of SafeNet, to six months imprisonment with three years of supervised release); *United States v. Sorin*, No. 06CR00723, (Dkt. No. 50) (E.D.N.Y. Oct. 20, 2009) (sentencing former-GC of Comverse Technology, Inc., to one year and one day imprisonment and three years of supervised release).

not for the obstruction enhancement—*i.e.*, four months.[25] And while the Court noted that Ms. Jensen was in a different guideline range following the Ninth Circuit's remand, it nonetheless departed further from four months, which was already in the middle of the appropriate guideline range, and imposed a lesser sentence of two months. (*See* Jensen RT (Jan. 6 , 2010) at 11:12–16 ("But the question now becomes should I continue with the thought that Miss Jensen should serve four months, and it's my view that that ought to have some modification in it. So that's how I feel at the present time."); *id.* at 14:23–15:4 (two-month sentence with no supervised release).)

Mr. Reyes respectfully urges the Court to consider a similar departure for his own sentence. As Ms. Jensen's counsel noted, "the so-called scandal of options backdating" has subsided or "fizzled" (*id.* at 5:10–12), which is particularly relevant, in light of changed accounting rules, to the factor of general deterrence. Moreover, Mr. Reyes asks that the Court consider his acquittal on the conspiracy charge and the Ninth Circuit's recognition that Brocade's senior finance officers knew of the company's backdating practices—none of whom have faced criminal prosecutions. The offense conduct now before the Court is of a different nature than before, in that the jury did not find that Mr. Reyes orchestrated a criminal conspiracy. He was not criminal partners with Ms. Jensen, and, by the government's own theory, he did not conspire with anyone else at Brocade. In light of these facts, Mr. Reyes asks the Court to consider the disparity between a two-month sentence for Ms. Jensen and a sentence approximately ten times that amount for Mr. Reyes.

E. The Need to Provide Restitution (18 U.S.C. § 3553(a)(7))

As discussed below and in Mr. Reyes's opposition to the government's brief seeking restitution (*see* Loss Response at 25–26), there is no need for restitution in this case.

[25] The Court stated in Ms. Jensen's first sentencing that "[i]n the event that the Court of Appeals sets aside the obstruction of justice [enhancement], . . . it would have been the Court's intention simply to impose the four month period of imprisonment, but not the supervised release and not the three months in a . . . residential reentry center." (*See United States v. Jensen*, Defendant Stephanie Jensen's Supplemental Sentencing Memorandum, Dkt. No. 921, at 3:18–26, citing Jensen RT (Jan. 6, 2010) at 17:8–19.)

VIII. RESTITUTION IS NOT WARRANTED IN THIS CASE, AND ANY CRIMINAL FINE SHOULD BE REDUCED FROM THE $15 MILLION IMPOSED IN THE FIRST SENTENCING.

A. There Is No New Evidence To Justify a Departure from the Court's Prior Conclusion that an Award of Restitution Is Inappropriate.

There is no dispute that Mr. Reyes's acquittal on the conspiracy charge renders an award of restitution inapplicable under the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A, because there was no conviction on a Title 18 offense. Even the government, in its Loss Memorandum, could only argue that restitution was permissible as an condition of supervised release. (*See* Loss Memorandum at 5–6 (arguing for $37.1 million in restitution).) The Court previously stated, during Mr. Reyes's first sentencing, that restitution "will be the subject of a civil action," referring then to the government's argument that Brocade was a "victim" of Mr. Reyes's conduct. (RT (Jan. 16, 2008) at 14:19–21.) As the Court is aware, Mr. Reyes has since paid $12.5 million to Brocade to resolve the derivative lawsuit.

The Court's reasoning is no less applicable now, where the government has not presented any reasonable or reliable method of identifying any victims that have suffered actual loss resulting from the offense conduct. *See* U.S.S.G. § 2B1.1, App. Note 1 (Guidelines restrict definition of "victim" to "any person who sustained any part of *the actual loss*") (emphasis added); (*see also* Loss Response at 25–26). The government still has not overcome the Court's previous finding that there is no evidence of victims who sustained actual loss caused by the offense conduct. (*See* Order at 5:24–25.) Without identifiable victims that suffered actual loss (and without having adequately proposed a method of distribution), restitution is inappropriate and unnecessary.

B. There Are Changed Circumstances Justifying a Reduction in the $15 Million Fine Previously Imposed.

Unlike restitution, the purpose of a fine under the Guidelines is punishment. *See* U.S.S.G. § 5E1.2(d) ("The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.")

As an initial matter, Mr. Reyes submits that the jury's not-guilty verdict on the Count 1 conspiracy charge in this trial, as opposed to the first trial, merits consideration as a basis to

impose a decreased fine. Even more significant, as relates to the appropriateness of a fine, Mr. Reyes, under the terms of his settlement with Brocade in the derivative action, has paid out of pocket all legal fees incurred after May 2, 2009. (*See* Brocade Derivative Settlement Agreement"), at ¶ 2, pgs. 3–4 (Dkt. No. 941, at 15–16).) Despite this substantial financial hardship, Mr. Reyes also is prepared to pay, to the extent possible, any fine the Court imposes out of his personal assets—as he did after the first sentencing, despite then having a contractual right to indemnification from Brocade.

Mr. Reyes further submits that the fine recommended by the Probation Office of $15 million is unduly punitive. *See* U.S.S.G. § 5E1.2; 18 U.S.C. § 3572(a)(3) (in evaluating whether to impose fine and amount of fine, Court must take into account "any pecuniary loss inflicted upon others as a result of the offense"); *id.* § 3572(a)(5) (same, noting requirement that Court consider "need to deprive the defendant of illegally obtained gains from the offense."). The Court properly found in the first sentencing that there was no reasonable means of identifying finding "actual harm," and Mr. Reyes submits that the government has failed to make the same showing—as well as a showing of "gain"—in this sentencing. This too demonstrates the need for a less severe fine.

Finally, the Probation Office's recommended fine, in light of other backdating prosecutions, is extremely disproportionate to what other executives have paid for backdating offenses. To Mr. Reyes's knowledge, no backdating defendant has paid anything near $15 million in a criminal fine. The former CEO of Take-Two was ordered by pay a combined total of $7.3 million to the district attorney's office and the SEC in lieu of all fines and disgorgement. (*See* Ex. 8 to the Jan. 10, 2008 Declaration of Ronda J. McKaig.) Further, the former President and COO of Monster Worldwide, who received the longest prison sentence for option backdating of which Mr. Reyes is aware, was not ordered to pay any criminal fine. *United States v. Treacy*, No. 08-CR-366, (Dkt. No. 130) (S.D.N.Y. Sept. 2, 2009). In that case, the court determined no criminal fine was necessary as punishment even though an 18-level enhancement had been imposed for loss. In short, the Probation Office has already recommended a sentence of imprisonment that is lengthy by comparison to other backdating

defendants (*see supra*, sections VII.A.1 & VII.B.1) and thus more-than-adequately reflects the seriousness of the offense, promotes respect for the law, and provides just punishment. (*See* U.S.S.G. § 5E1.2(d)(1).) Such a substantial fine is not necessary to further punish Mr. Reyes.

IX. CONCLUSION

For the reasons set forth above, Mr. Reyes respectfully requests that the Court grant a significant downward variance from the Guideline range, impose the minimum possible term of supervised release, make no order of restitution, and substantially reduce the $15 million fine imposed in 2008.[26]

Dated: June 14, 2010

COOLEY LLP

/s/
STEPHEN C. NEAL

Attorneys For Defendant
GREGORY L. REYES

863393/HN

[26] Mr. Reyes originally lodged this memorandum with the Court (and served it on counsel for the United States) on Monday, June 14, 2010, pending his administrative motion to file under seal this memorandum as well as the Declaration of Neal J. Stephens and exhibits in support thereof. (*See* Dkt. No. 1195.) In accordance with the Court's denial of the motion to seal (*see* Dkt. No. 1200), Mr. Reyes has filed this memorandum publicly via the Court's ECF system. Mr. Reyes has separately filed a renewed motion to seal certain highly personal and confidential letters, submitted as Exhibits P, Q, R, S, and T to the Declaration of Neal J. Stephens in support of this memorandum.